JD(SF)–80-04
Phoenix, AZ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

EXPOTEL HOSPITALITY SERVICES, L.L.C.
and HHP-PHOENIX, L.L.C., A Single Employer

and Case 28-CA-19185

MICHELLE A. EVENS, an Individual

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Phoenix, AZ, for the General Counsel.

Michael W. Sillyman, Atty. *with David M. Park, Atty*.
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for Respondent.

Michelle Evens, Pro Se.

DECISION

Statement of the Case

WILLIAM L. SCHMIDT, Administrative Law Judge. The Complaint in this case alleges that Expotel Hospitality Services, L.L.C. and HHP-PHOENIX, L.L.C., a single employer (Respondent or Hotel), violated Section 8(a)(1) of the Act.[1] Specifically, the complaint charges that Respondent created the impression that it engaged in surveillance of employee protected activities, actually engaged in surveillance of its employees' protected activities, coercively interrogated employees, threatened employees with discharge or other unspecified reprisals for engaging in concerted activities, issued Michelle Evens (Evens or Charging Party) an undeserved reprimand, and unlawfully discharged Evens.

The case arose from the unfair labor practice charge Evens filed on December 2, 2003.[2] Based on that charge, the Regional Director issued a formal complaint on January 30, 2004. I heard the case from May 10 through 12, 2004, in Phoenix, Arizona. On the entire record,

[1] Section 7 of the Act provides employees with the fundamental right to engage in union organizational activities as well as "other concerted activities for the purpose of . . . mutual aid and protection." Section 8(a)(1) seeks to prevent employer meddling with employees exercising their Section 7 rights by making it an unfair labor practice for an employer "to interfere with, restrain, and coerce employees in the exercise of rights guaranteed in Section 7." Section 10 empowers the Board to "to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce."

[2] All relevant events occurred in 2003. Unless shown otherwise, all dates refer to that calendar year.

including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

Respondent HHP-PHOENIX (HHP), a limited liability corporation, maintains an office and place of business in Phoenix, Arizona, where it operates a full-service hotel commonly known as Embassy Suites Phoenix North. During the 12-month period preceding December 2, Respondent HHP's gross revenues exceeded $500,000 and it purchased and received goods valued at more than $5,000 directly from suppliers located outside the State of Arizona. HHP admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The parties stipulated that Expotel Hospitality Services, L.L.C. and HHP-PHOENIX, L.L.C. are a single employer

II. Alleged Unfair Labor Practices

A. Background

The issues presented by this case concern the lawfulness of the September 26 termination of Michelle Evens, a banquet captain in the Hotel's catering department, and some incidental actions and statements by certain of the Hotel's managers prior to her termination.

The Hotel employs about 120 employees. The general manager, Ricky Greenwald, oversees all of the Hotel's operations and supervises its executive committee. That committee includes Rhonda Finck, the human resources director and Nick Agostinelli, the food and beverages director, as well as others who do not figure in this dispute.[4] David Mowry, the catering operations director, reports to Agostinelli and Michael Scaife, the catering services manager, reports to Mowry.

The Hotel's catering department employs approximately 30 employees in the catering department but only about 10 work full-time. The Hotel classifies its catering employees as captains, servers, housemen (also known as "set up" employees) and bartenders. These employees do the preparation work necessary for the Hotel's banquet functions and serve any food and beverages associated with those events. Ordinarily, a captain and one or more servers will be utilized for each event but two captains may work larger events. The housemen prepare the banquet facilities for functions by setting up the tables and chairs as well as any special audio-visual or other equipment required for the event. Typically, the Hotel's busiest banquet periods occur in the Spring and Fall months. The Summer months, in particular, tend

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[3] In addition to considering the demeanor of the witnesses who appeared at the hearing, the findings detailed below resulted from my consideration of the weight of the evidence generally, established or admitted facts, inherent probabilities, reasonable inferences drawn from the record, and, the various other factors triers of fact consider in resolving credibility. See *Northridge Knitting Mills*, 223 NLRB 230, 235 (1976). Testimony contrary to my findings has been carefully considered but it has not been credited.

[4] Greenwald explained that the Hotel's executive committee "varies a little bit but [usually includes the] director[s] of sales, accounting, human resources, food and beverage, engineering, [and the] revenue manager, usually about six." T140: 24-5, T141: 1.

to be so extremely slow for catered events that most of the banquet department employees must either find other work or live off their savings.

Charging Party Evens began working for the Hotel as a part-time cocktail waitress in September 1994. About four months later, she received a promotion to a bartender's position. During her first year at the Hotel, she also worked in the banquet department as an on-call bartender and server. The Hotel promoted Evens to a banquet captain's position in 1998, a job she held until her termination.

Evens compiled an excellent work record while in Respondent's employ. She received above-average annual performance reviews and the maximum pay increases available. Under the Hotel's performance review system, the employee's supervisor provides a narrative statement evaluating both the employee's "strengths" and "development needs." Catering operations director Mowry stated in her 2002 review that Evens made "an excellent contribution to the banquet department." In her 2003 review, Mowry stated that Evens' "dedication and good service has helped the banquet department become one of the best" but felt that her "communications skills with fellow employees" needed improvement. He counseled that "a more sincere tone . . . is more effective that being forward or scolding individuals." That aside, in this review prepared three months prior to her termination, Mowry rated her performance as superior in eight categories, commendable in three categories, and average in one category evaluating her as a "team player." GCX 9. Evens recalled that she had received many letters from guests and customers praising her work and that she had received the "Employee of the Month" award three times, the last time being in 2002. Finally, Evens once received a regional award for her work that came with a free trip for two to New Orleans.

The Hotel maintains a uniform requirement for its service employees such as those who work in the catering department. See RX 1: 3. The winter uniform consists of tuxedo trousers and a white tuxedo shirt with a black bow tie. The summer uniform consists of tuxedo trousers and a white polo shirt. At appropriate times – usually when daylight savings time changes nationally – general manager Greenwald announces the new uniform requirement in a memo to the department heads and they, in turn, post the memo or inform their employees about the change. In 2003, Greenwald announced that the change to the winter uniform would be effective on October 20. See GCX 15. However, the Hotel requires the catering employees to wear the winter uniform regardless of the time of year for all evening functions, at all functions held with a VIP in attendance, and at functions where the customer requests a more formal uniform.

The Hotel pays employees biweekly; its pay period runs from Saturday through Friday. The catering department employees receive a base hourly wage plus a share from the "gratuity pool," a fund derived from 70% of the 20% surcharge the Hotel adds to the catering customer's bill.[5] Employees learn about the size of a gratuity pool in any given pay period from the gratuity report the Hotel issues on the Monday or Tuesday morning after the pay period ends. Hence, the size of the catering bills control the size of the gratuity pool.

But other factors affecting the size of the gratuity pool occasionally come into play. For example, the Hotel's "satisfaction guaranteed" policy can reduce the size of the pool if management concludes that the customer's bill should be adjusted as the result of a complaint. As Charging Party Evens explained, if the Hotel decides to refund half of a $10,000 banquet tab

[5] Occasionally, a guest may also separately tip the banquet captain and the servers but this practice does not figure in this dispute.

because of a customer complaint, the gratuity would be reduced from $2000 (20% of $10,000) to $1000 (20% of $5000). She recalled one occasion when the Hotel refunded the entire amount of a wedding banquet because it had to be moved to another room over the customer's strenuous objection. According to Evens, the previous owner's management would add funds from other accounts to increase an unusually low gratuity pool. She claims that the Hotel's managers discontinued this practice after the current owners acquired the property in 1998. No one corroborates Evens' claim that the prior management occasionally sweetened the pool and the current managers denied this practice ever occurred or that any area hotel contributes added money to their employees' gratuity pools.

Over the years, employees occasionally griped among themselves about the size of the gratuity pool. About a year before the events leading to her discharge, Mowry spoke to Evens after he overheard her complain about a gratuity pool. He told her that he did not want anyone "talking badly" about the gratuity pay. Mowry explained to Evens that Greenwald overheard Dan Lapuste, a houseman, complaining about the gratuity pay following one particular event and had told him (Mowry) that if he heard others complaining about it they "might not have a job." Catering services manager Scaife recalled that, before he became a manager, Evens often complained to him and other servers about the gratuity pool.

B. The Facts of this Dispute

In the first part of September, the Hotel hosted the Copper Con science fiction group for five days. This organization meets at the hotel annually to conduct its program. Although many members stay at the hotel and individually purchase food and beverages, the organization does not utilize the services of the Hotel's catering department in connection with its meetings. However, this and other similar groups do require set-up employees to arrange the meeting rooms they utilize. But due to the lack of a food and beverage component the surcharge ordinarily amounts to about a one-third of what would be normal for a group this size and an event of this duration.

By the week of September 18, Evens knew that she had been scheduled to serve as the captain at a luncheon banquet scheduled for Monday, September 22, arranged by the Coalition to End Homelessness. At least several managers claimed to know that the Mayor of Phoenix would be attending this function but no credible evidence establishes that they provided any of the catering employees with that information. Based on Evens' knowledge, the September 22 event would be an ordinary luncheon.

Regardless, Mowry telephoned Evens at home in the week prior to the September 22 luncheon to advise her that he wanted the catering employees to return to the winter (formal) uniform the following week.[6] Since she would serve as the catering captain for the event, he

[6] I have relied on Evens' testimony regarding the time, place, and manner of Mowry's directive concerning the uniform for September 22. In my judgment, the confusion and time needed to sort through unreconciled detail concerning this and many other factual details resulted in part from the overuse of Rule 611(c) of the Federal Rules of Evidence. Here for example, counsel for the General Counsel first adduced Mowry's story that he issued the directive to Evens in person with Scaife present. T215. Next, she adduced Mosley's account that Mowry issued the directive to Evens and herself in the banquet office. T305-306. Finally, she adduced Evens' testimony that Mowry telephoned her with the uniform directive. T421. As Scaife did not testify about this matter and as Mosley seemed to lack knowledge of the designated uniform during the Saturday cafeteria gathering (T423-424), I have credited Evens.

expected her to notify the others staffing the luncheon of this change. However, she perceived the early uniform change to be a highly unusual move since outdoor temperatures still ranged above 100° Fahrenheit daily, Greenwald had issued no property wide uniform-change directive as yet and, as far as she knew, the other staff members in other departments would continue with the summer uniform. But even for indoor events, the banquet crew would often need to go outside to transport linen to and from the laundry. In addition, from time to time caterers assisted the dishwasher if he got behind and occasionally had to mop floors. Evens questioned Mowry about the directive noting that other employees still wore the summer uniform and it was still hot out. Mowry told her he decided to make the change so that the banquet employees would look more professional.

Late Saturday Evens spoke with banquet employees Christol Mosley, Secundino (Dino) Marquez, Claudia Milas, and Mayra Hernandez in the employee cafeteria. During their conversation Christol asked what uniform they should wear for the Monday luncheon. Evens told the group about Mowry's request that they return to the winter uniform beginning the following Monday. When she then asked what they thought about that, one of group remarked that it would be 105° F. and another said that employees in other departments would still be wearing the summer uniform. Evens suggested that they also continue wearing the summer uniform but some present initially hesitated fearing that they would get into trouble. After Evens told them that she would "take the heat on it," the others agreed to go along.

Before going to work the following Monday, Evens spoke with two more servers, Aaron Williamson and Sam Oprea, to let them know that the rest of the employees would be wearing polo shirts for the luncheon that day. In addition, Evens obtained a couple of extra polo shirts from one of the housemen ostensibly in case others did not have polo shirts. Mowry asked what happened "to wearing the winter uniforms?" when he saw Evens. She told him that everyone wanted to wear the polo shirts. He said nothing further at that time but asked Evens to see him after the lunch. When Evens went to see Mowry after the lunch, he said nothing further about the uniform; instead, he spoke to her about an unrelated matter of money she had obtained for him.

At some point following her arrival at work on September 22 and her brief exchange with Mowry about the uniforms, Evens met houseman Lapuste on the lower level of the facility adjacent to the catering office and the audio/visual cages, just a short distance (15 feet or so) from the entrance to the employee cafeteria. Evens asked Lapuste if the setup employees were upset about how low the Copper Con gratuity had been. He told her they were.[7] Ronda Finck overheard their exchange as she walked out of the cafeteria, in particular a remark by Evens to the effect that if they worked at a "decent hotel, they would put some money in the gratuity pool for us." Hearing this, Finck walked over to the two employees because she became concerned about the tone and inflection that Evens had used. According to Finck, she asked "if there was a problem, is there something I can do to help?" Evens claims Finck approached and said, "I heard you two bitching. I thought I'd come over and see what was going on." Finck admittedly told Evens she knew of no hotel in the area that contributed money to the employee gratuity pool. Lapuste made a brief remark and left. Evens told Finck that the Copper Con gratuity pay turned out to be so low that the servers ended up making less than people working at Whataburger, a small fast food competitor of McDonalds, Burger King, and the like. Evens added that she knew of other hotels that contributed money to the gratuity pool in like circumstances. Finck told her "if I were still working I wouldn't complain." Finck asked Evens

[7] Three other Hotel employees who attend a nearby university with Evens previously complained to her about the low gratuity pool produced by the Copper Con event.

again if she had a problem. When Evens told her she was just having a bad day, Finck turned and walked away.

After Finck left Evens, she sought out Mowry to speak with him about what she overheard between the two catering employees. Finck asked Mowry to step outdoors so they could speak privately. She explained that she sought, in effect, to train Mowry with handling personnel problems. She asked if there had been a problem with the gratuity pool because she overheard Evens complaining to Lapuste about it. Mowry told Finck that Evens had a bad attitude and went on to inform her about the failure of the employees to wear the winter uniform that Monday as he had instructed.[8] Finck told Mowry that Evens' conduct sounded like insubordination justifying her termination but Mowry demurred by telling Finck that he was unwilling to terminate her.[9] Finck then told him that Evens' refusal to follow a direct order at least deserved some type of disciplinary action because this type of insubordination would continue if he let her get away with that type of conduct.

Later that day, Finck informed general manager Greenwald that Evens had refused to follow Mowry's orders to change uniforms and that she had overheard Evens complaining to Lapuste about the gratuity pay. With respect to gratuity pay, Finck told Greenwald that Evens complained because the Hotel did not contribute to the small gratuity pools as other hotels did. Greenwald instructed Finck to make sure that Evens received discipline over the uniform incident and that she should meet with Agostinelli and Mowry to discuss how to handle it. Following Greenwald's directive, Finck spoke with Agostinelli by telephone. Finck admittedly told Agostinelli about Evens complaining to Lapuste regarding gratuity pay. Agostinelli told Finck that Mowry had already told him about that. Agostinelli and Finck agreed that Evens should be disciplined "for her behavior."

Agostinelli also spoke to Greenwald about Evens' gratuity-pay complaints. He told Greenwald that Mowry had reported to him that Evens had complained to Scaife and Finck about the gratuity pay. Greenwald said that was of concern to him because if Evens had a problem she failed to approach the "people who can help her solve it or explain it." But he also admitted that he stated in a pre-hearing affidavit that his "concern over Evens was not that she was complaining, but the manner in which she was doing so in front of other employees." In the affidavit, he added: "We were concerned that Evens' attitude would reach the rest of the employees." T148: 5-15.

Following lunch on September 23, Mowry issued Evens a disciplinary warning in the presence of catering services manager Scaife. During their conversation, Mowry told Evens that he had wanted to return to the tuxedo uniforms beginning the previous day and that he wanted to discuss her crew's failure to wear the uniform he requested. She told him that the rest of the hotel still wore summer attire and the temperatures remained very hot. Mowry told her that regardless he wanted to portray a more professional image and that their polo shirts looked pretty "shabby." Evens complained that the shirts looked bad because they had not been replaced for the past two or three years even though employees had been asked every year for shirt sizes but had never gotten new polo shirts for the catering crews.

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[8] Finck acknowledged that she had stated in her pre-hearing affidavit that Mowry had informed her during this conversation that he had instructed Mowry and her crew to change to formal uniform for the Monday function. T51-52.

[9] Respondent's Rules of Conduct includes insubordination among "Acts of Gross Misconduct" that "may lead to suspension pending investigation, leading termination of employment." See RX 1: 7-8.

Mowry also told Evens that Finck overheard her talking to other employees about the gratuity pay resulting from the Copper Con convention and had come to him about it. He told her that she should stop talking about gratuity pay "especially around other employees." Evens argued with Mowry that the low gratuities from events like the Copper Con convention immediately following the end of the slow summer season was "a hardship on people." Mowry told her that employees were "free to go find another job." Scaife added that they would hold people back if they felt "they needed to leave."[10]

Toward the end of the September 23 disciplinary conference, Mowry had Evens sign a prepared written warning referred to by Hotel parlance as a "performance action form." GCX5.[11] The conduct described as giving rise to the discipline reads:

> On Friday 9/19/03 I requested that all servers wear black and white uniforms from that point forward. On Mon. 9/22/03 Michelle's staff wore polo shirts. She stated that "they" decided they wanted to wear polos. Also, on Saturday 9/20/03 Michelle and I agreed to sit down on Monday after her lunch shift. She left without speaking to David. Michelle also did not complete a captain's report for her function.

No evidence shows that Mowry and Evens discussed any matters referred to on the personnel action form other than the uniform issue during their September 23 conference. Near the end of the conference, Mowry told Evens that she could have been terminated over the uniform issue and that Finck raised that possibility with him. Evens asked Mowry if he wanted to terminate her. Mowry told her that he did not because she did "a really good job" and that he gets "a lot of compliments from the guests." He added: "[I]f I wanted to terminate you this conversation wouldn't be held in this office; it would be taking place in human resources." As the session ended, Mowry told Evens that he wanted to change her schedule for the coming Thursday so that she would serve as the captain for Julie Mendonca's wedding rehearsal banquet. Evens readily agreed as she felt quite friendly toward Mendonca, an assistant controller in the hotel's accounting department for the past several years.

Later in the day, Mowry summoned Evens to the chef's office to sign the backside of the personnel action form. At that time, Evens told Mowry "it was fun being a rebel for a day." Mowry laughed and they joked about it together for a short while. None of the other employees who worked the luncheon on September 22 received discipline for appearing at work in the wrong uniform. In fact, no evidence shows that Mowry, Scaife, nor anyone else even spoke to the others about the uniform episode.

As earlier arranged, Evens worked as the banquet captain for the Mendonca/Ross wedding rehearsal party on September 25. As Scaife prepared to leave before the event ended, he told Evens that he had already prepared the check for the event and that she should post it to the "house account" after she added in the wine consumed.[12] Toward the end of the dinner (around 7:30 p.m. or so), Tom Ross asked Evens if they needed to settle up. In

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[10] Mowry and Scaife deny that they spoke to Evens about gratuity pay during the disciplinary conference. However, I credit Evens. Her recollection that Mowry said that Finck talked to him because she overheard Evens discussing the gratuity pay comports with admitted facts. Absent an acknowledgment from someone that Finck spoke to Mowry about this matter, Evens would have no way of knowing that Finck had done so.

[11] GCX 5 and 11 appear to be duplicate exhibits. Although Evens clearly identified her signature on the form, she recalled that the form she signed had a reference to the gratuity pay issue. I find her recollection about the content of the form mistaken.

response, Evens told Julie Mendonca that she was not sure what was going on as she had been told to put the check on the house account so she did not know if the Hotel was picking up the check or not. Ms. Mendonca told Evens that she knew they had to "pay something." Evens promised to check the situation out with Mowry and let her know.

Evens then telephoned Mowry for instructions about the billing of the rehearsal banquet. She told Mowry that she had the impression that the dinner would be comped since she had been instructed to post it to the house account and it carried an "A&G number." Mowry instructed Evens to leave it on the house account and he would take care of it on Monday.

About 10 minutes later, after the Mendonca/Ross group left, Mowry called Evens back. During this call, Mowry instructed Evens to put the Mendonca/Ross bill on the catering spreadsheet.[13] Evens responded by pointing out to Mowry that it had an "A&G number" which, at least to her, made it appear as though the event would be comped by the Hotel. Mowry then told her in a perturbed tone of voice "[N]o, we don't do it for anybody else. Why would we do it for her?" Evens replied, admittedly in a sarcastic tone, "Maybe because she's been here a long time. We used to care about people."[14] Mowry did not respond to her comment but he perceived it to be very rude. Evens explained that her remark to Mowry grew out of her frustration with Hotel managers who had, in her opinion, "just lost the compassion and empathy we had for people." At the hearing, she cited two recent examples where, as she perceived it, catering department managers failed to show sufficient empathy for employees suffering from personal tragedies. However, no evidence shows that she addressed what she saw as their callousness with anyone apart from making a very vague and tangential reference to it when she was fired the next day. Regardless, Mowry admits that Evens complied with his directions concerning the proper posting of the Mendonca/Ross bill.

Purportedly, Mowry reported Evens' rudeness to Finck the following morning and told her that he now thought Evens should be terminated because she was not good for the Hotel anymore. With respect to her telephone call, Mowry became upset about Evens' complaining about the way the Hotel treated employees and the tone of her voice while complaining. Mowry along with other managers concluded that Evens should be terminated because her attitude "was not fixable." He said that they felt her "negative attitude about the Hotel" would "catch on with other employees." T153: 18 through T154: 12. Finck asked Mowry to prepare a written recap of the September 22 telephone call.

Finck claims that she later spoke to Agostinelli about terminating Evens and that he too felt they had no alternative in view of her insubordinate remark to Mowry the previous evening to the effect that the Hotel did not care about its employees anymore. In Agostinelli's opinion, "she was rude, inconsiderate . . . she pretty much told Mr. Mowry that we don't care about the

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[12] The catering department maintains three separate spreadsheets – banquet, catering, and house account. Charges to the house account, Evens claimed, imply that the Hotel is paying for the event or that it has been discounted to cost but she admittedly lacks detailed knowledge of the billing procedures.

[13] The Hotel uses the catering spreadsheet for a "one-time deal like a wedding."

[14] This quoted finding comes from Evens' testimony. However, Mowry claims that Evens told him that the Hotel should give Ross the dinner for free because she was a long-term employee. He responded by asking, rhetorically, why the Hotel should do that when they had not done that for any other employees. To that, Evens purportedly stated, "Oh, I forgot. This hotel does not take care of its employees like it used to." T227. He recounted a similar story in the written recap he prepared the following day. GCX 13.

employees in this hotel, and that's total insubordination as far as I'm concerned." T183, 21-24. Finck later notified Greenwald that Agostinelli and Mowry had signed off on terminating Evens for insubordination and Geenwald approved that action. But Greenwald probably knew about Evens' remarks to Mowry of the previous evening somewhat before Finck spoke to him about it. Thus, he admitted that Agostinelli told him that Evens "was upset" about how the Hotel handled the bill for the Mendonca/Ross event in light of the fact that Julie Mendonca had been a long-term Hotel employee. Greenwald claims that Agostinelli told him that Evens had complained to Mowry about the Hotel's failure to properly care for its employees. Based on the Agostinelli report, Greenwald also had the impression that another employee overheard Evens remarks to Mowry but no evidence supports that fact.

About mid-afternoon Evens arrived at work to prepare for the annual Catholic Diocese dinner scheduled for that evening. Mowry intercepted her at the time clock and told her that they wanted to speak with her in Agostinelli's office. She followed Mowry there where, after they were seated, Agostinelli began by saying the he was very upset about what he had heard. Agostinelli asked her if she knew that she could have been terminated but failed to say for what. Evens, assuming Agostinelli's remark referred to the earlier uniform matter, responded that Mowry had told her that. Agostinelli then told Evens that he had heard about her talking to employees concerning the gratuity pool and told her that she should not do so because it was bad for morale. She responded that everyone was talking about it but Agostinelli brushed her claim off by saying that "at least 10 people" overheard her talking about the gratuity pool. Regardless, Evens then told Agostinelli that the Hotel had added money to the gratuity pool in the past when it hosted groups such as the Copper Con. Agostinelli denied that any such practice ever occurred or that any other hotel ever contributed extra money to the employees' gratuity pool.

Raising his voice, Agostinelli then mentioned that Evens seemed to have a negative attitude toward the Mendonca/Ross dinner apparently because she seemed to think that it had been comped and, therefore, no money would have gone into the gratuity pool. Agostinelli added that he was very upset over her remark to Mowry implying that the Hotel never does anything for anyone.

Concluding from Agostinelli's tone of voice that he had become angry about her remark to Mowry Evens acknowledged that she too became mad and that she sought to defend herself. She told Agostinelli that her remarks had been taken out of context. She added that she knew that the "Hotel does do things for people" and acknowledged that the Hotel had paid for her college tuition and that it matched her 401(k) contributions. Instead, she told Agostinelli, her remarks to Mowry concerned compassion rather than money. After Evens finished speaking back, Agostinelli said, "[W]ell, there's the negative defensive attitude. I have no alternative but to end it." He told her that she could pick up her check on Monday, to leave the Hotel by the most direct route, and not to talk to anyone on the way out. After Agostinelli said that, Evens turned to Mowry and asked "[W]hat were you smoking or drinking last night?" and then left.[15]

When Evens returned to the Hotel for her pay check, she asked Finck for copies of the laudatory letters she received from customers over the years. They reviewed her personnel file

[15] Agostinelli claims that he informed Evens of her termination essentially by reading from the prepared personnel action form, that she signed the form, and that no discussion about gratuity pay occurred. Because Respondent failed to produce a termination form signed by Evens and the poor impression I gained from Agostinelli's demeanor, I credit Evens' more detailed account.

and found very little material. In addition, Evens' asked for a copy of her termination form at this time as well as during a later telephone call with Finck. No such form was ever provided to her.

C. Further Findings and Conclusions

1. Interrogation, Threats, Creating Impressions of Surveillance, Surveillance, and Overly Broad and Discriminatory Rulemaking

Finck at the Evens-Lapuste Conversation. The General Counsel contends that Finck engaged in unlawful surveillance, created the impression of surveillance, and coercively interrogated Evens and Lapuste when she broke in on their conversation near the audio/visual cage on September 22. Among other contentions, counsel for the General Counsel argues that this conversation occurred in a non-public locale rarely frequented by management personnel. Respondent argueS that Evens was not engaged in protected activity at the time because she admitted that her comments were directed at Lapuste rather than management and that she also admitted that she was not trying to change the Hotel's policy regarding contributions to the gratuity pool. In addition, Respondent argues that all of Evens' co-workers admitted they did not authorize Evens, or anyone else, to speak with Hotel management on their behalf about altering the gratuity pool. Finally, the Respondent claims that no surveillance occurred because Finck fortuitously overheard the two employees talking in a common area of the Hotel used by managers and employees alike.

The Board and the courts employ an objective rather than a subjective standard when determining whether statements by an employer or its agents violate Section 8(a)(1). The test seeks to determine only whether the conduct at issue reasonably tends to interfere with employees' free exercise of their Section 7 rights. *NLRB v. Hitchiner Mfg. Co*., 634 F.2d 1110, 1113 (8th Cir. 1980); *Miller Electric Pump and Plumbing*, 334 NLRB 824 (2001).

At the outset, I reject Respondent's claim that Evens was not engaged in protected concerted activity while speaking with Lapuste and subsequently when she spoke with Finck herself. Protected concerted activity embraces those circumstances where individual employees seek to initiate, induce, or prepare for group action, as well as those circumstances where individual employees bring group complaints to the attention of management. *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*). A conversation may constitute a concerted activity although it involves only a speaker and a listener if the speaker sought to initiate, induce or prepare for group action, or if the speaker's words had some relation to group action in the interest of the employees. *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). Concerted activity can include concerns expressed by an individual that are the logical outgrowth of concerns expressed by the group. *Mike Yurosek & Son, Inc.,* 306 NLRB 1037, 1038 (1992). Where a single employee acts to induce group action, no express announcement about the object of the activity is required as the Board may infer from the circumstances whether or not the activity was concerted. *Whittaker Corp.*, 289 NLRB 993, 993-994 (1988).

The situation here involved the start of another busy season with employees working a Copper Con event that apparently produced little revenue for the gratuity pool and left a number of employees complaining about that fact. Some of this grumbling occurred in Evens' presence. Moreover, Christol Mosley, another banquet captain, told Evens that the hotel where her boyfriend worked purportedly primed their employees' gratuity pool if an event produced low gratuity revenue. Whether true or not, Evens claimed that the Hotel also had a similar practice under the prior ownership. Furthermore, the gratuity pool, by its very nature, involved a concern to all of the banquet employees rather than Evens alone. Accordingly, I find that Evens' discussions with other employees concerning the gratuity pool and her advocacy for added

contributions by the Hotel where an event failed to enough produce gratuity revenue constituted protected concerted activity. *Manimark Corporation*, 307 NLRB 1059 (1992).

At the same time, I do not agree with counsel for General Counsel's contention that the Evens-Lapuste conversation occurred at a location rarely visited by the Hotel's managers. In fact, it occurred adjacent to the employee cafeteria frequented with some regularity at least by Finck and, most probably, by other Hotel managers. But the Board does not require that employees attempt to keep their activities secret before an employer can be found to have created an unlawful impression of surveillance, nor is it necessary for an employer's words to reveal on their face that it acquired knowledge of the employee's activities by unlawful means. *Grouse Mountain Lodge*, 333 NLRB 1322, 1323 (2001), *United Charter Service,* 306 NLRB 150, 151 (1992).

Where, as here, employees openly engage in protected activities on the employer's premises, management officials may lawfully observe those activities but they may not do anything out of the ordinary to keep the protected activities under watch. *Albertsons v. NLRB*, 161 F.3d 1231, 1238 (10th Cir. 1998). See also *The Broadway*, 267 NLRB 385, 399-402 (1983) and the cases cited there. Likewise, a statement to employees causing them to reasonably assume that their employer had placed their protected activities under surveillance violates the Act. *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999); *Electro-Voice, Inc*., 320 NLRB 1094 (1996). The Board has found that an employer engaged in unlawful surveillance and created the impression of surveillance within the same set of circumstances. *Seton Co.*, 332 NLRB 979, 981 (2000).

As for Finck's questioning that allegedly occurred after she approached Evens and Lapuste, the Board applies a totality-of-the-circumstances test to determine whether questioning of employee constitutes unlawful interrogation. *Rossmore House,* 269 NLRB 1176 (1984), affd. Sub nom. *Hotel Employees Union Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985). Ultimately, the Board's task is to "determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the [questioned] employee so that he or she would feel restrained from exercising rights protected by Section 7 of the Act." *Westwood Health Care Center,* 330 NLRB 935, 940 (2000).

In my judgment, the principles cited above require that I first resolve this essential question: Having fortuitously overheard two employees discussing their wages, did Finck approach them for the purpose of providing a legitimate business response or for the purpose of deliberately quelling their protected discussion? Plainly, Finck had the right to do the former but not the latter. Thus, in *Tres Estrellas de Oro*, the Board said, in effect, that the rationale behind finding that an impression of surveillance statement violates Section 8(a)(1) relates to employees' rights to engage in protected activities without the fear that members of management are peering over their shoulders, taking note of those involved and how. 329 NLRB at 51. But, if the facts supported the conclusion that Finck approached the employees to explain a management's position non-coercively or, perhaps, to entertain remedial suggestions from the complaining employees, a finding of unlawful interference would not be warranted.

However, Finck plainly betrayed a lack of a legitimate business purpose when, following Evens' "Whataburger" statement and her added suggestion that the Hotel contribute money when low gratuity pools occurred, she remarked, "if I were still working I wouldn't complain." Moreover, the fact that Finck promptly reported the substance of Evens' activity to her supervisor, her manager, and to the Hotel's general manager lends support to my conclusion that she sought to interfere with protected employee activity. This is particularly so, where as found below, her supervisor, on the very next day, sought to unlawfully restrict her protected

efforts to advance gratuity pool reforms through discussions with other employees. Accordingly, I find that Finck violated Section 8(a)(1) as alleged in connection with her involvement in the Evens-Lapuste conversation.

Mowry During Evens' Disciplinary Meeting. Complaint paragraph 4(c) includes among its allegations claims that Mowry created an impression of surveillance, threatened employees with discharge or unspecified reprisal if they engaged in concerted activities, and orally announced, promulgated and maintained an overly-broad and discriminatory rule prohibiting employees from discussing gratuity pay among themselves.

In agreement with the General Counsel, I find unlawful Mowry's directive to Evens during their September 23 meeting that she should stop talking about gratuity pay "especially around other employees" as well as his remark that Finck overheard and told him about her talking to another employee concerning gratuity pay. Gratuities constitute a significant component of the catering employees' wages. The Board holds that an employer may not bar employees from discussing their wages absent a business justification for such a prohibition. *Heck's Inc.*, 293 NLRB 1111, 1119 (1989). Here, Respondent does not assert any business justification for barring employee talk about the gratuity pay issues. Accordingly, I find Mowry's directive to Evens violated Section 8(a)(1) as alleged. Similarly, Mowry's disclosure that Finck came to him after overhearing her gratuity pay discussion with Lapuste would tend to lend force to the perception that management kept careful note of those who breached the ban on gratuity pay discussions. For that reason, I find Mowry further created an impression of surveillance in violation of Section 8(a)(1) as alleged.

The General Counsel also contends that Mowry's statements during this conference that she could be terminated over the uniform issue and that employees unsatisfied with the gratuity pay system were free to leave amount to an unlawful threats that violate Section 8(a)(1). I agree with the former contention but not the latter. Thus, Mowry made the free-to-leave statement in response to Evens' assertions concerning the hardship events such as the Copper Con meeting at the beginning of the season caused the catering employees. In this context, I find Mowry's statement to be a statement of fact protected by Section 8(c) of the Act.

But Mowry's termination statement is another matter. For reasons discussed at some length below, I find the September 22 uniform protest constituted protected concerted activity. By telling an employee of potential penalties for protected conduct, an employer independently violates the Act. *TPA, Inc.*, 337 NLRB 282, 283 (2001). Hence, I find Mowry's statement to Evens that she could have been terminated over the uniform protest to be coercive, particularly when accompanied by his further disclosure that Finck and he discussed imposing this more severe penalty, whether or not General Counsel has properly labeled it by calling it a "threat." Accordingly, I find Mowry's termination statement violated Section 8(a)(1).

Agostinelli During Evens' Termination Conference. The complaint alleges that Agostinelli, during Evens' discharge conference, created the impression the employees' concerted activities were under surveillance. In support of this allegation, General Counsel points to his remark that at least ten people overheard her complaining about the gratuity pay. Respondent seems to argue that this allegation lacks merit because it occurred at a time when Agostinelli was engaged in terminating Evens. The complaint also alleges that Agostinelli threatened employees with discharge or unspecified reprisal if they engaged in concerted activity. In support of this allegation, the General Counsel points to Agostinelli's remark that she could have been fired earlier for the uniform protest.

I agree that the General Counsel has sustained both allegations. Plainly, the substance of Agostinelli's ten-people remark, coupled with his summary rejection of her claim that others too had complained about the gratuity pay would have a strong tendency to convey the notion that management had been carefully monitoring employee discussions about gratuity pay. Likewise, having concluded below that the uniform protest amounted to protected concerted activity at all times, I find Agostinelli's reminder to Evens that she could have been terminated for it violated Section 8(a)(1), as alleged. *TPA, Inc.*, supra.

2. Evens' Written Warning and Her Subsequent Discharge

The Written Warning. General Counsel alleges that Mowry violated Section 8(a)(1) by issuing Evens "an unwarranted and undeserved written reprimand on September 23. See Complaint paragraph 4(c)(3). General Counsel argues that "Evens also engaged in protected activity when she refused to wear her winter uniform in 107 degree heat." As the findings detailed above establish, Evens solicited others scheduled to work that day to refuse to wear the more formal attire as Mowry directed. Citing *E. R. Carpenter*, 252 NLRB 18 (1980), counsel for the General Counsel argues this "uniform protest" is protected conduct. Respondent argues that Evens' conduct amounted to insubordination under the Hotel's written policies and that Evens' reprimand resulted solely from "her failure to follow Mowry's direct order."

In *E. R. Carpenter,* the Board adopted Judge Giannasi's application of *Washington Aluminum*[16] rationale to a situation where employees concertedly refused to perform their regular duties inside a small building containing highly toxic fumes because the protective gear normally worn there had become too defective to provide adequate protection. *Washington Aluminum* holds that an employer violates Section 8(a)(1) by discharging or disciplining employees who engage in a concerted protest of their terms and conditions of employment. In that seminal case, the employer discharged several employees who concertedly refused to commence work in a plant that became bitterly cold following the breakdown of the heating system.

The lawfulness of the Hotel's September 23 disciplinary action against Evens does not turn on the issue of motive. Respondent admits that her discipline of that date resulted from her failure to wear the formal uniform commencing on that date as directed by Mowry. In this context, the analysis from *Wright Line*[17] and its progeny would be inapplicable. *Felix Industries*, 331 NLRB 144, 146 (2000). Here, the essential question presented is whether the conduct of the catering staff on September 22 lost any potential protection afforded under Section 7 because of its insubordinate character.

The protection provided to employees by Section 7 of the Act includes activities for purposes of "mutual aid or protection" so long as such activity is "concerted." Accordingly, the activities of Evens and the other employees relating to the September 22 uniform protest would be protected if they were both "concerted" and done "for mutual aid or protection." The Act does not expressly define "concerted activity" but "[t]he term 'clearly embraces the activities of employees who have joined together in order to achieve common goals.'" *New River Industries, Inc.*, 945 F.2d 1290, 1294 (4th Cir. 1991) (quoting *City Disposal Systems, Inc.*, 465 U.S. 822, 830 (1984)). Evens and the other catering employees scheduled to work on September 22 met in the cafeteria on September 20 following Mowry's formal attire pronouncement. At that time,

[16] *NLRB v. Washington Aluminum Company, Inc.*, 370 U.S. 9 (1962).

[17] *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

they concluded that it would be unfair if they were required to wear the formal attire at all times while the Hotel permitted other employees to wear the informal uniform during periods of the extreme Southwestern heat. I find the catering employees acted concertedly by collaborating about this subject on Saturday night and by appearing at work in the polo shirt uniform on the following Monday.

The Act likewise does not define the phrase "for mutual aid or protection" but at a minimum it "protects employees who 'seek to improve terms and conditions of employment.'" *New River Industries, Inc*., 945 F.2d at 1294 (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)). "The conditions of employment which employees may seek to improve . . . include wages, benefits, working hours . . . [and] dress codes . . . ." *New River Industries, Inc.*, *supra*, at 1294. Accordingly, I find that the uniform protest pertained to the working conditions of the Hotel's catering employees so it may reasonably be said to have been for their mutual aid or protection.

The only remaining question relates to whether the employees' uniform protest lost its protected status because of its insubordinate character. In making that determination, the Board balances the employees' exercise of Section 7 rights against their employer's right to maintain order and respect. *Brunswick Food & Drug*, 284 NLRB 663, 664 (1987) (quoting *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965)). This approach is solidly grounded on the disposition of the insubordination argument in *Washington Aluminum.*

Here, I find the protest by the catering employees on September 22 remarkably temperate, knowable only to a select, inside group aware of Mowry's directive the week before. Insofar as this record shows, not even employees in other departments would have been aware of the catering department uniform protest and certainly the hotel's customers would have no way of knowing that the uniform protest was occurring in their presence. Thus, Evens and the other catering employees performed all the duties required of them September 22 but in the wrong uniform, albeit a uniform approved for their use up to that day and for use by all other Hotel employees for another three weeks. For these reasons, I find that this protest resulted in only an extremely minor encroachment on the Hotel's right to maintain order and respect in the work place. To conclude that this much muted protest would be unprotected because of its insubordinate character alone would, as the Supreme Court said in *Washington Aluminum,* "prohibit even the most plainly protected kinds of concerted [activities] until and unless the permission of the company's [official] was obtained." As I have concluded that the uniform protest did not lose its statutory protection, I find that Respondent violated Section 8(a)(1), as alleged, by issuing Evens a written warning on September 23 for her leading role in that protest. *Earle Industries, Inc*. 315 NLRB 310 (1994).

Evens' September 26 Termination. General Counsel claims that Respondent terminated Evens for her concerted activities during the week of September 22. Respondent contends that Evens "was terminated for making a sarcastic and rude comment to her supervisor Mowry, just two days after receiving a written warning for ignoring Mowry's direct orders." Respondent contends that the remark during the September 25 telephone call between Evens and Mowry lacked the Act's protection. Instead, Respondent argues, Evens was "simply being disrespectful, rude, sarcastic, and impertinent." Respondent's Br.: 17.

Assuming, as General Counsel argues, that Evens' remark on the telephone about the Hotel's lack of care for its employees is statutorily protected activity, then Agostinelli clearly violated Section 8(a)(1) by terminating her for reason. *NLRB v. Washington Aluminum Company, Inc.*, supra at fn. 15. The fact the Mowry set the machinery in motion that lead to Evens' termination because she complained to him about the way the Hotel treated its

employees in a tone of voice he did not like lends considerable support to such a conclusion. On the other hand, if Evens' remark on the telephone lacked statutory protection, as Respondent argues, because it did not seek to change a company policy or induce or prepare for group action, I would nevertheless find that the General Counsel sustained the burden of proving her termination violated the Act.

In *NLRB v. Transportation Management Corp*., 462 U.S. 393, 401 (1983), the Supreme Court approved the Board's test in *Wright Line*, supra at fn. 20, setting forth the analytical model applicable to resolving adverse action cases that turn on the issue of employer motivation. Having assumed that the remark Evens made to Mowry on September 25 was not concerted, I find that the dual motive analysis under Wright Line applies to this adverse action. Under the *Wright Line* test, the General Counsel has the burden of showing that protected activity constituted a motivating factor for an employer's adverse action against an employee. More precisely, this means that the General Counsel has the burden of persuading the fact finder that the employee's protected conduct, *in fact*, amounted to a motivating factor for the employer's action. *Webco Industries*, 334 NLRB 608, fn 3 (2001). In assessing whether the General Counsel has met his burden of persuasion, the fact finder may consider the explanation provided by the employer for the adverse action. *Holo-Krome Co. v. NLRB*, 954 F.2d 108, 113 (2nd Cir. 1990).

If the General Counsel establishes that the employee's protected activity motivated the employer's adverse action, the burden of persuasion then shifts to the employer to establish, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in the protected conduct. *Best Plumbing Supply, supra.* Because the employer bears the burden of persuasion, not merely production, *Transportation Management Corp.,* supra, it cannot simply recite a legitimate reason for the discharge but must "persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984).

I find the General Counsel has made a compelling case that Evens' protected conduct motivated her termination. First, the evidence establishes that Evens' sharp tongue had been noted by management in past evaluations but had never been sufficient to even minimize her annual pay increases or been the basis for any past warning. Second, neither Mowry nor any other manager could point to similar situations where an employee had been terminated for using a occasional sarcastic tone of voice when addressing a manager. Third, Evens' plainly protected gratuity pay complaints and discussions that occurred earlier in the week got a remarkably hostile reception all the way up the local management chain as well as an unlawful directive that she cease talking about the gratuity pay. Fourth, the uniform protest led by Evens resulted in an unlawful written warning just two days before the termination. Fifth, Respondent admits that the unlawful disciplinary action over the uniform protest contributed to its decision to terminate Evens and it would be reasonable to infer that her gratuity pay complaints also contributed to this decision. Sixth, the evidence suggests that both Agostinelli and Mowry viewed Evens' so-called offense over the phone with a closed mind as the former treated even her effort to explain herself during the conference as further impertinence and the latter gave no indication during the call that he regarded her remark as out of line. Seventh, Greenwald's concern that Evens' poor attitude would adversely affect other employees amounts to code language that obviously referred to her recent protected activities. Eighth, the timing of Evens' termination in relationship to her concerted activities provides considerable support for the inference that the discharge of this heretofore excellent employee resulted from her protected activities. Based on the foregoing, I am satisfied that the General Counsel has persuasively shown that Hotel officials came to regard Evens as a troublemaker because of her concerted activities and terminated her for that reason.

Respondent's defense rests largely on the assumption that Evens' conduct earlier in the week lacked any legal protection. Because that assumption is erroneous, Respondent's burden here would require a persuasive showing that it would have terminated Evens for her unprotected remark during the September 23 telephone call to Mowry even if she had not engaged in the other conduct earlier that week. I find Respondent failed to meet that burden. Indeed, it did not even make that argument. Accordingly, I have concluded that Respondent violated Section 8(a)(1) of the Act by terminating Evens on September 26.

Conclusion of Law

Respondent, an employer within the meaning of Section 2(2) of the Act, engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by coercively interrogating employees, engaging in surveillance of employees' concerted activities, creating the impression among employees that their concerted activities are under surveillance, threatening employees in order to discourage concerted activities, issuing written warning to Evens discharging her because she engaged in concerted activities.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully discharged Evens must offer her reinstatement to her former position, or if that position no longer exists, to a substantially equivalent position without prejudice to her seniority or other rights and benefits. In addition, Respondent must make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent must further expunge from any of its records any reference to Evens' September 23 written warning and her September 26 discharge, and notify her in writing that such action has been taken and that any evidence related to those disciplinary matters will not be considered in any future personnel action affecting her. *Sterling Sugars, Inc*., 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Expotel Hospitality Services, L.L.C. and HHP-PHOENIX, L.L.C., a single employer (Respondent), Phoenix, AZ, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Coercively interrogating employees about activities protected by Section 7 of the Act.

[18] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the Board will adopt these findings, conclusions, and recommended Order as provided in Section 102.48 of the Rules, and all objections to them shall be deemed waived for all purposes. I deny all pending motions inconsistent with this Decision.

b. Engaging in surveillance of employee activity protected by Section 7 of the Act.

c. Creating the impression that activities protected by Section 7 of the Act are under surveillance.

d. Threatening employees who engage in activities protected by Section 7 of the Act.

e. Issuing warnings to employees because they engage in concerted activities protected by Section 7 of the Act.

f. Discharging employees because they engage in concerted activities protected by Section 7 of the Act.

g. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Within 14 days from the date of this Order, offer Michelle Evens full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

b. Make Michelle Evens whole for any loss of earnings and other benefits suffered as a result of her September 26, 2003, discharge in the manner set forth in the remedy section of the administrative law judge's decision.

c. Within 14 days from the date of this Order, remove from its files any reference to the Michelle Evens' unlawful written warning and discharge, and within 3 days thereafter notify her in writing that this has been done and that the written warning and discharge will not be used against her in any way.

d. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

e. Within 14 days after service by the Region, post at its hotel in Phoenix, Arizona, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility

[19] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 22, 2003.

f. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: December 21, 2004, at San Francisco, CA.

_____
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT coercively question you about your activities protected by Section 7.

WE WILL NOT engage in surveillance of your activities protected by Section 7.

WE WILL NOT give you the impression that your concerted activities are under surveillance.

WE WILL NOT threaten you for engaging in concerted activities.

WE WILL NOT issue warnings to, or discharge you because you engage in concerted activities protected by Section 7.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce you for exercising your rights guaranteed by Section 7.

WE WILL, within 14 days of the NLRB's order, offer Michelle Evens full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Michelle Evens whole for any loss of earnings and other benefits suffered as a result of her September 26, 2003, discharge together with interest as provided by law.

WE WILL, within 14 days of the NLRB's order, remove from our files any reference to the Michelle Evens' September 23, 2003, written warning and to her September 26, 2003, discharge, and within 3 days thereafter, **WE WILL** notify her in writing that this has been done and that her written warning and her discharge will not be used against her in any way.

Expotel Hospitality Services, L.L.C.
and HHP-PHOENIX, L.L.C., a single employer
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099

(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.